

August 3, 2010

**VIA E-MAIL
ELECTRONIC FILING**

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

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AUG 3 - 2010

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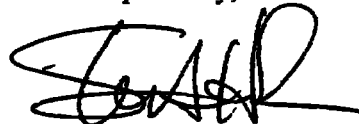
**RE: STB Docket No. AB-1043 (Sub-No. 1) Montreal Maine & Atlantic Railway,
Ltd - Abandonment and Discontinuance of Service - in Aroostook and
Penobscot Counties, ME**

Dear Chief Brown:

As requested by the Board in its July 20, 2010 Decision in this proceeding, I am transmitting with this cover letter the Supplemental Comments of Twin Rivers Paper Company LLC and Fraser Timber Limited in support of the imposition, if necessary, of trackage rights under 49 USC § 10903 and § 10904 as a condition of any abandonment and discontinuance in this proceeding. These materials have been electronically filed with the Board and have been served on parties of record via e-mail.

Please let me know if you have any questions.

Respectfully,



Steven A. Hudson
Attorney

SAH:
Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
DISCONTINUANCE OF SERVICE AND ABANDONMENT –
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

**SUPPLMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

August 3, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
DISCONTINUANCE OF SERVICE AND ABANDONMENT –
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

**SUPPLEMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

In response to the Board's request in this matter for the parties to provide supplemental argument and evidence regarding whether and to what extent the Board can impose access conditions across an applicant's retained lines as conditions for the approval of an application to discontinue service and abandon other lines, Twin Rivers Paper Company LLC ("Twin Rivers") and Fraser Timber Limited ("FTL") file these supplemental comments, supported by the Verified Statements of Brian Sass of Twin Rivers and Arkon Horne of FTL. As noted in previous filings with the Board in this matter, Twin Rivers recently acquired certain assets of Fraser Papers Inc including the pulp mill in Edmundston, New Brunswick and the paper mill in Madawaska, Maine. FTL owns sawmills in Masardis and Ashland, Maine. The Madawaska, Masardis and Ashland facilities are all served by the Montreal Maine & Atlantic Railway ("MMA") and are affected by the proposed discontinuance and abandonment. Collectively, the companies employ almost 1,500 employees and indirectly support more than 3,400 jobs in the region.¹ Twin Rivers and FTL support the State of Maine's request that, unless the parties mutually agree on access conditions, the STB impose commercially reasonable access rights, specifically trackage

¹ See Verified Statements of Brian Sass and Arkon Horne, Sass page 2 and Horne page 2, filed August 2, 2010.

rights, across the lines retained, in order to alleviate the potential abusive situation created by the applicant's retention of all access to the nation's rail system.

Need for Trackage Rights

As noted by Brian Sass and Arkon Horne in their attached Verified Statements, access rights are necessary in this instance to (1) attract the investment needed to purchase and maintain the affected rail lines and other equipment; (2) allow affected shippers to maintain and potentially increase shipments, ensuring the financial stability of rail service to all the affected shippers and communities; and (3) ensure commercially reasonable and timely connections to Canada's rail system, especially in light of NAFTA and other North American trade policies; and (4) not reward an applicant for abandoning lines and discontinuing service by allowing them the right to dictate to other carriers and shippers the terms and conditions for access to the national rail system.

Twin Rivers and FTL also believe that the nature of the access rights is critical. Both in the attached Statements, as well as in other testimony before the Board in this matter, these companies have raised concerns over the efficiency and reliability of MMA. The companies are concerned that merely granting haulage rights will perpetuate these inefficiencies while also injecting the potential for additional costs and delays by adding at least one more interchange. These concerns would be alleviated, and operating efficiencies made possible, if the MMA were further removed from the operations of any new operator, through the granting of trackage rights as a part of any decision granting the abandonment in whole or in part.

STB Authority to Grant Trackage Rights

It is well settled that Congress gave the Board and its predecessor, the Interstate Commerce Commission, exclusive and plenary authority to regulate abandonments.² It is also clear from the plain language of 49 U.S.C. § 10903 and well settled by precedent that the Board may impose post-abandonment terms and conditions as part of any abandonment proceeding.³ § 10903 provides that the Board may "...approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity..."⁴ At least one court has noted that not only can the Board impose conditions, the Board may also bifurcate abandonments, granting them in part and denying them in part.⁵ The Board is recognized by courts as having been delegated authority to use its plenary jurisdiction to pursue and implement national transportation policy goals. It does so and also determines "public convenience and necessity" under 49 USC § 10903 by balancing multiple factors, including potential harm to affected shippers and communities.⁶ However, Congress specifically required the Board, when making such a finding, to "consider whether the abandonment or discontinuance will have a serious adverse impact on rural and community development."⁷ Therefore the Board not only has the power to impose conditions, including trackage rights, as part of any abandonment under § 10903; but in fact, has a duty to do so when shipper and

² See *Chicago and North Western Transportation Company v. Kalo Brick*, 450 U.S. 311 (1981) and cases cited therein.

³ See 49 USC § 10903 and *Hayfield Northern R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984).

⁴ 49 USC § 10903(e)(1)(B).

⁵ See *Indiana Sugars Inc. v. ICC*, 694 F.2d 1098.

⁶ See *Decision and Certificate of Interim Trail Use Agreement in Union Pacific Railroad Co. – Discontinuance of Trackage Rights and Abandonment – in Natrona and Converse Counties, WY*, (STB Docket No. AB-133 (Sub-No. 113) (STB Served November 12, 1997), quoting *Colorado v. U.S.*, 271 U.S. 153 (1926) ("U.P.-Natrona")

⁷ 49 USC § 10903(d).

community interests, rural and community development considerations, and national transportation policy goal implementation require such rights.

The applicant's case citations in this area are not on point as noted by the Board on page 3 of its July 20, 2010 Decision in this proceeding, as the citations refer to § 10904 authority only.⁸ But perhaps more importantly, the Board in *U.P.-Natrona*, a Decision more recent than those cited by the applicant, indicated that its interpretation of its authority under § 10904 is not as settled as the applicant suggests.⁹ In fact, there appear to be far better policy reasons for a determination that § 10904 does not circumscribe the Board's plenary jurisdiction and authority in the manner suggested by the applicant and the cases it cites. The Board's primary duty is to implement national transportation policy goals. It makes that duty more difficult to accomplish if by the absence of specific language in § 10904, the Board is not authorized to impose terms and conditions, including access rights, in a "pure" § 10904 case. It is contradictory to Congressional purpose not to allow the Board to impose terms and conditions as it deems necessary to accomplish its Congressional charge, especially where the various cases cited indicate that some terms and conditions are seemingly allowed in § 10904 cases and some are not. In any event, the Board, as in *U.P.-Natrona*, does not need to decide this issue under § 10904 in this proceeding, since it clearly has the authority it needs under § 10903.

Finally the Board asked for comment on its authority to order access over a carrier's lines into a foreign country. There is no apparent distinction between the Board's authority to order access *within* the U.S. borders and its authority to order access *to* the U.S. borders. To argue otherwise is to argue that Congress did not intend its national transportation policy goals to extend to the borders of the United States, and even further, that when it ratified the North

⁸ See *Decision in Montreal Maine & Atlantic Railway, Ltd. – Discontinuance of Service and Abandonment – in Aroostook and Penobscot Counties, Me.* STB Docket No. AB 1043 (Sub-No. 1) (STB Decided July 20, 2010)

⁹ See *U.P.-Natrona*, page 14.

American Free Trade Agreement, it intended to exempt the Board from compliance while binding the rest of the federal government. Such an argument makes a mockery of the Board's responsibility to carry out such policies and to perform its duties. If the Board makes a finding that public convenience and necessity, considering the potential impact upon rural and community development, allow the granting of access to the borders of the United State across such lines in order to approve an abandonment or discontinuance, then the Board is able to require compliance with any appropriate terms and conditions for such access under § 10903.

Terms and Conditions of Trackage Rights

As an initial matter, Twin Rivers and FTL suggest that the Board need not consider the specific terms and conditions of trackage rights at this time. Apparently the State of Maine and the applicant continue to hold discussions on the type of terms and conditions, such as cost and duration, mentioned by the Board in its July 20, 2010 Decision. The companies suggest that the Board allow such informal private negotiations to continue for now. Only in the event that the two parties do not reach agreement in a timely manner (or if one or more interested parties object to the terms and conditions agreed upon), should the Board be required to impose commercially reasonable terms and conditions. At that point, the Board could invite parties to submit supplemental evidence and argument on specifics such as cost and duration. Twin Rivers and FTL request the right to submit supplemental evidence and argument at that time.

In the event that the Board does not allow supplemental comments on this topic and without waiving the request in the prior paragraph, Twin Rivers and FTL suggest that trackage rights should be granted permanently, while the cost of such rights should be initially fixed for a term of years sufficient to allow any new carrier to develop a successful operating system, and to

build its operating revenue from increased volume from the region's shippers. In fact, since the applicant is prepared to operate without the volume and revenues from the shippers on the stranded segment, then the Board should, if necessary, impose a trackage rights fee that only reimburses direct costs associated with a new carrier's cars moving across applicant's retained lines. No financial return element is necessary in this instance, since the applicant has chosen to forgo any such element related to such lines when it proposed the abandonment and discontinuance. Twin Rivers and FTL suggest that if needed, the fee could be re-evaluated periodically to ensure that it accurately reflects such costs, perhaps every five years.

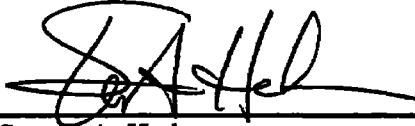
Conclusion

The particulars of the facts in the current proceeding argue strongly for the need for trackage rights to either be mutually negotiated or imposed by the Board, as to do otherwise rewards the applicant for purposefully stranding the segments serving the affected shippers and communities. As it has suggested itself, the Board has the ability to impose terms and conditions, including trackage rights, in proceedings such as the current one in order to accomplish its duties and carry out the policies established by Congress. It has clear explicit authority to do so in § 10903, especially to mitigate adverse impacts on rural and community development. The better argument, and one that the Board has seemingly reserved to itself when appropriate, is that the Board also has such authority under § 10904. The Board also clearly has the authority to impose trackage rights to the borders of the United States in order to perform its necessary and delegated duties. Finally, the Board should allow additional supplemental evidence and argument over cost, duration and other specific terms, if the negotiating parties

cannot reach agreement. Such rights need to be permanent and any fees should be strictly limited to reimburse the applicant for costs imposed by such rights.

Respectfully submitted,

TWIN RIVERS PAPER COMPANY LLC and
FRASER TIMBER LIMITED

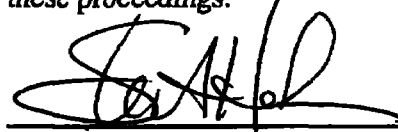
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Steven A. Hudson
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Augusta, ME 04332-1058
207/623-5300
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Attorneys for Twin Rivers Paper Company LLC and Fraser Timber Limited

Certificate of Service

I hereby certify that I have served the foregoing Supplemental Comments and accompanying Verified Statements this 3rd day of August, 2010 by causing copies to be sent the applicant and other parties of record in these proceedings.

A handwritten signature in black ink, appearing to read 'Steven A. Hudson', written over a horizontal line.

Steven A. Hudson

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
DISCONTINUANCE OF SERVICE AND ABANDONMENT –
IN AROOSTOOK AND PENOBSCOT COUNTIES, MAINE**

**SUPPLEMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

VERIFIED STATEMENT OF BRIAN SASS

August 3, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
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**SUPPLEMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

VERIFIED STATEMENT OF BRIAN SASS

My name is Brian Sass and I am the Vice President of Operations for Twin Rivers Paper Company LLC ("Twin Rivers"). At the end of April 2010, Twin Rivers Paper acquired certain assets of Fraser Papers Inc including the pulp mill in Edmundston, New Brunswick and the paper mill in Madawaska, Maine. I previously provided testimony to the Board as part of the Motion to Reject or Dismiss Application, filed in March, 2010 and as part of a joint Protest filed in April, 2010 in this proceeding. In that earlier testimony, I described the history of the Twin Rivers Madawaska Paper Mill ("Mill") in Madawaska, Maine, including the mill's experience with the Montreal, Maine & Atlantic Railway ("MMA"). I also explained that Fraser (and now Twin Rivers) is opposed to permanent cessation of rail service on the rail line between Madawaska and Millinocket because the company (1) would be harmed by the loss of the option of using the direct southbound route from Madawaska, and (2) is concerned about losing direct access to the U.S. rail network and being forced to route its rail traffic only through Canada.

Lastly, I raised numerous concerns and questions about how, if the abandonment is approved, MMA would organize its rail operations with a split in its rail system.

In this Verified Statement I respond to the Board's request of the parties to provide supplemental argument and evidence regarding whether and to what extent the Board can impose access conditions across the applicant's retained lines as conditions for the approval of the application to discontinue service and abandon its other lines.

Twin Rivers acquired the Edmundston and Madawaska mills out of bankruptcy; directly securing the jobs of approximately 1,300 employees in this cross-border region. Using a conservative multiplier, these mills support more than 3,700 other jobs indirectly.¹ As a result, more than 5,000 jobs related to one shipper are dependent on the Board choosing to exercise its discretion and authority to impose terms and conditions for line abandonments, in the absence of a voluntarily negotiated agreement, sufficient to allow another operator to successfully serve the shippers on the abandoned lines; and even more importantly, to serve their customers on lines outside of the current MMA territory.

The provision of commercially reasonable access rights is critical to the continued rail service to the shippers and communities affected by the proposed abandonment. It is unreasonable to expect that anyone will be willing to risk the millions in investment needed to purchase and rehabilitate the abandoned line without any certainty of commercially reasonable access rights. As a business executive with many years of freight and shipping experience across various rail systems, I can testify that in my opinion a line abandoned by a carrier, which becomes isolated on more than one end by the retained lines of that same carrier, only retains

¹ See Bivens, Josh, Updated Employment Multipliers for the U.S. Economy (2003), Working paper No. 268, Economic Policy Institute, August 2003

commercial value if access to the rest of the nation's rail system is certain, affordable and reliable.

In addition, Twin Rivers believes that reliable, affordable rail service provided through commercially reasonable access rights will allow it to increase rail shipments to customers to at least recent historical numbers, perhaps increasing outbound rail traffic from Madawaska by 20% or more. Such an increase would help support the provision of reliable affordable service to other shippers and the affected communities. Failure to provide such rights will result in continuation of existing trends of poor, unreliable service and reduced shipments as a result. Failure to ensure such rights will subject Twin Rivers and other shippers to the market power of MMA, which will control the access points to other rail systems, the costs of such access, and the terms and conditions under which such access will be granted.

With regard to ensuring access across the northern line proposed to be retained by MMA, Twin Rivers (and Fraser previously) have testified to the importance of reliable and affordable access. As the Board is aware, when MMA originally obtained the lines from the bankrupt Bangor & Aroostook Railway, it quickly sought to extinguish access rights previously granted across the northern line, both in federal bankruptcy court and before the Board itself.² While such access has been preserved for Twin Rivers, it is not available on certain, commercially reasonable terms to other shippers. Because of the location of these U.S and Canadian lines; the locations of shippers, suppliers, and customers in both countries; and the U.S. and North American trade policies in effect, it is my opinion that access across the northern line to the Canadian rail system is not only appropriate, but necessary to ensure continued economic development for the cross-border region.

² *Canadian National Railway Company – Adverse Discontinuance – Lines of Bangor & Aroostook Railroad Company and van Buren Bridge Company in Aroostook County, Maine* STB Docket No. AB-279 (Sub-No.3).

The nature of the access rights is also important. In my opinion, mere haulage rights would be inadequate for the circumstances of the proposed abandonment and the needs of the affected shippers and communities. In the absence of mutually agreed-upon trackage rights, Twin Rivers and other similarly affected shippers need the Board to impose commercially reasonable trackage rights as a condition of granting the discontinuance and abandonment. Some of my previous testimony before the Board in this matter illustrates the need for trackage rights in order to ensure that the affected shippers and any new operator are not impeded in our efforts to continue rail service by MMA's retention of, and control over, the lines connecting the abandoned lines with the nation's rail system. As I stated in my April 2010 Verified Statement, no information has been provided by MMA concerning how it will provide the operations it has described for the stranded segment. In my April Statement, I also described my concerns with service quality and costs for the MMA proposed operations.³ These concerns would be alleviated, and operating efficiencies made possible, if the MMA were further removed from the operations of any new operator, through the granting of trackage rights. MMA would be made whole through the imposition of a commercially reasonable fee for such rights. Without such trackage rights, I am concerned that it will be difficult, if not impossible, to secure a new operator and ensure that they have a meaningful opportunity to be commercially successful. Given the MMA's position on the economics of operating the stranded segment, any terms and conditions should be very favorable to any new operator, especially for the first several years, in order to allow such new operator to develop a successful operating system. In fact, since the MMA is apparently prepared to operate without the volume and revenues from the shippers on the stranded segment, then a good case could be made for imposing a trackage rights fee that

³ See Verified Statement of Brian Sass, *Montreal, Maine & Atlantic Railway, Ltd – Discontinuance of Service and Abandonment – in Aroostook and Penobscot Counties, Maine*, STB Docket No. AB-1043 (Sub-No. 1), April 2010

only reimburses MMA for direct costs associated with such new operator's cars moving across MMA's retained lines.

VERIFICATION

I, Brian Sass, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.

A handwritten signature in black ink, appearing to read 'B. Sass', is written over a horizontal line.

Brian Sass
Vice President, Operations
Twin Rivers Paper Company LLC

Dated

7/28/10

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1043 (Sub-No. 1)

**MONTREAL, MAINE & ATLANTIC RAILWAY, LTD –
DISCONTINUANCE OF SERVICE AND ABANDONMENT –
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**SUPPLMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

VERIFIED STATEMENT OF ARKON HORNE

August 3, 2010

**BEFORE THE
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STB DOCKET NO. AB-1043 (Sub-No. 1)

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**SUPPLEMENTAL COMMENTS OF
TWIN RIVERS PAPER COMPANY LLC and FRASER TIMBER LIMITED**

VERIFIED STATEMENT OF ARKON HORNE

My name is Arkon Horne and I am the Controller for Fraser Timber Limited ("FTL"). FTL owns sawmills in Masardis and Ashland, Maine. I previously offered comments for the Board's consideration in this matter, most recently during the public hearing in Presque Isle, Maine in July, 2010. In those comments, I described the nature of FTL's business and its need for reliable, affordable, and efficient rail service in order to compete with companies located in other parts of the country. I related my company's frustration with the Montreal, Maine & Atlantic Railway ("MMA"), who currently operate the lines proposed for abandonment. I also explained that FTL is opposed to permanent cessation of rail service on the lines proposed for abandonment because the company would be harmed by incurring increased costs for delivery of its products and by losing direct access to the U.S. rail network.

In this Verified Statement I respond to the Board's request of the parties to provide supplemental argument and evidence regarding whether and to what extent the Board can impose

access conditions across the applicant's retained lines as conditions for the approval of the application to discontinue service and abandon its other lines.

FTL's mills currently employ approximately 145 people. At full production, employment would rise to about 250. Using a conservative multiplier, these mills support more than 725 other jobs indirectly.¹ As a result, nearly 1,000 jobs related to FTL are dependent, if the Board chooses to grant the discontinuance and abandonment, upon the availability of commercially reasonable access rights for any new operator.

The provision of commercially reasonable access rights is critical to the continued operations of FTL. As a manufacturer of dimensional lumber, FTL competes in a commodity business. As with other commodity businesses, the cost of freight is one of the largest differentiators in the dimensional lumber business. In addition, nearly all of our customers are outside the territory served by the lines proposed for abandonment. As a result of the commodity nature of our business, and the geographic location of our customers and competitors, FTL is extremely sensitive to freight cost impact on our business. While rail service is one way in which our freight costs can be effectively managed, this will not be true if the lines are abandoned without provision for commercially reasonable access rights. Failure to secure commercially reasonable access rights, whether through mutual agreement or through Board imposition as a condition for any abandonment, will jeopardize the chances for locating any new operator for the abandoned lines, as well as jeopardize the success of any new operator, should one be located. It is unreasonable to expect that anyone will be willing to risk the millions in investment needed to purchase and rehabilitate the abandoned line without any certainty of commercially reasonable access rights.

¹ See Bivens, Josh, Updated Employment Multipliers for the U.S. Economy (2003), Working paper No. 268, Economic Policy Institute, August 2003

In addition, FTL believes that reliable, affordable rail service provided through commercially reasonable access rights will allow it to increase rail shipments to at least recent historical numbers, perhaps increasing outbound rail traffic from FTL's mills by 5% or more. Such an increase would help support the provision of reliable affordable rail service to other shippers and the affected communities. Failure to provide such access rights will result in continuation of existing trends of poor, unreliable service and reduced shipments as a result. It is a sad thought that MMA may be allowed by the Board to abandon the lines, and still hold the economic power to unilaterally decide under when, and under what terms, FTL and other shippers may access the rest of the nation's rail system.

For these same reasons, and based on FTL's experience with the quality of service from the MMA, FTL believes that mere haulage rights would be inadequate, considering the circumstances of the proposed abandonment, the needs of the affected shippers and communities, and the desirable goal of finding a new operator for the lines proposed for abandonment. To attract, and create the basis for success for, a new operator; FTL believes that trackage rights are necessary. Granting any new operator the broadest possible rights in order to ensure their success in providing rail service to our business and region, would reduce shipper anxiety about quality of service and allow the new operator to achieve additional operating efficiencies. This would further build shipper confidence and increase shipper volumes, leading to a more stable rail service situation. While MMA should be made whole for out of pocket costs associated with operations under such trackage rights, they should not be allowed to hold any new operator economically hostage, much less the shippers and communities in the region.

VERIFICATION

I, Arkon Horne, verify under penalty of perjury that the foregoing is true and correct based on my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.



Arkon Horne
Controller
Fraser Timber Limited

Dated 8/3/2010